



**EAO v JMA & another (Commercial Case E002 of 2025)
[2026] KEHC 2735 (KLR) (12 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
COMMERCIAL CASE E002 OF 2025
TW CHERERE, J
FEBRUARY 12, 2026**

BETWEEN

EAO CLAIMANT

AND

JMA 1ST RESPONDENT

PKM 2ND RESPONDENT

RULING

1. The Claimant, E.A.O., moved this Court by way of an Originating Summons dated 09th October 2025, brought pursuant to sections 2, 6, 7, 9 and 17 of the Matrimonial Property Act, No. 49 of 2013, the Matrimonial Property Rules, 2022, and the Civil Procedure Act and Rules.
2. The claim concerns L.R. No. Matutu Settlement Scheme/XXX, which the Claimant contends constitutes matrimonial property acquired during the subsistence of her marriage to the 1st Respondent, J.M.A.
3. The Claimant seeks the following orders:
 1. A declaration that L.R. No. Matutu Settlement Scheme/XXX constitutes matrimonial property.
 2. An order restraining the Respondents from alienating, selling, mortgaging or transferring the suit property pending determination of a suit for division of matrimonial property.
 3. An order restraining the Respondents from selling, mortgaging, alienating or otherwise dealing with the suit property pending determination of the parties' respective contributions.
 4. An order restraining the Respondents from evicting or denying the Claimant access to the matrimonial home.



5. Costs of the suit.
4. The Originating Summons is supported by an affidavit sworn by the Claimant on 09th October 2025. She deposes that the parties contracted a customary marriage in 2004, later solemnised through a civil ceremony on 27th April 2011, and that the marriage subsists. The Claimant avers that the suit property was acquired in 2014 during the subsistence of the marriage and that a matrimonial home was constructed thereon through joint effort and contribution.
5. The Claimant further alleges that on 25th September 2025, the 1st Respondent damaged her motor vehicle, assaulted the children, and forcibly evicted her and the children from the matrimonial home, causing them to flee and report the matter at Matutu Police Station on the same night. The Claimant deposes that statements were recorded at the police station and that criminal proceedings were subsequently instituted against the 1st Respondent at Keroka Law Courts. She expresses apprehension that the suit property may be alienated unless restrained by the Court.
6. The Originating Summons is opposed through a Replying Affidavit sworn on 22nd October 2025 by the 1st Respondent. He admits the existence of the marriage but denies that the Claimant made any direct or indirect contribution towards the acquisition or development of the suit property, asserting that it was acquired and developed solely through his own financial means.
7. The 1st Respondent further denies the allegations of violence and eviction, contending that the Claimant left the matrimonial home voluntarily and relocated to Nairobi. He also denies any intention to alienate the suit property and challenges both the propriety of the Originating Summons procedure and the legal basis of the reliefs sought.
8. The Claimant filed a Further Affidavit sworn on 29th January 2026, expressly denying that she left the matrimonial home voluntarily and reiterating that she was forcibly evicted on 25th September 2025.
9. The Claimant's written submissions dated 30th January 2026 urge that the suit property, L.R. No. Matutu Settlement Scheme/XXX, was acquired during the subsistence of the marriage and qualifies as matrimonial property under section 6 of the *Matrimonial Property Act*. The Claimant further relies on section 17 of the Act and Article 45(3) of the *Constitution* in support of her claim for declaratory reliefs.
10. In response, the 1st Respondent's submissions dated 26th January 2026 challenge the propriety of the Originating Summons, dispute the alleged contribution by the Claimant, and contend that the reliefs sought are premature in light of the subsisting marriage and contested factual issue.

Issues for Determination

11. Having regard to the orders sought, the Court identifies the following issues for determination:
 1. Whether the Claimant is entitled to a declaration that the suit property constitutes matrimonial property
 2. Whether the Claimant is entitled to injunctive relief restraining alienation or dealings with the suit property
 3. Whether the Claimant is entitled to injunctive relief restraining eviction or denial of access to the matrimonial home
 4. Whether the issues can be conclusively determined on affidavit evidence alone



Analysis and Determination

1) Whether the Claimant is entitled to a declaration that the suit property constitutes matrimonial property

12. The Claimant anchors her claim on sections 6, 14 and 17 of the *Matrimonial Property Act* and Article 45(3) of the *Constitution*, contending that the suit property was acquired during the subsistence of the marriage and that she made both direct and indirect contribution towards its acquisition and development.
13. The 1st Respondent disputes this claim and relies on the settled principle that beneficial interest in property registered in the name of one spouse does not arise automatically by virtue of marriage, but must be proved through evidence of contribution.
14. In *Peter Mburu Echaria v Priscilla Njeri Echaria* [2007] eKLR, the Court of Appeal held that a spouse who alleges a beneficial interest in property registered in the name of the other must establish contribution, whether direct or indirect, and that such interest does not arise merely from the existence of a marriage. That principle was reiterated in *PWK v JKG* [2015] eKLR, where the Court emphasised that Article 45(3) of the *Constitution* guarantees equality of spouses but does not translate into automatic equal ownership of property acquired during marriage.
15. Similarly, in *PNN v ZWN* [2017] eKLR, the Court of Appeal cautioned against the misconception that marriage confers a fifty percent proprietary entitlement in matrimonial property in the absence of proof of contribution.
16. Even though section 14 of the *Matrimonial Property Act* raises a rebuttable presumption where property is acquired during marriage in the name of one spouse, the existence, nature and extent of the Claimant's alleged contribution are vigorously contested in the present matter.
17. Resolution of that contest would require the Court to interrogate evidence relating to financial input, non-monetary contribution, and the circumstances under which the property was acquired and developed. Such matters cannot be conclusively resolved on affidavit evidence alone.
18. In the circumstances, the Court finds that the Claimant's entitlement to the declaratory relief sought cannot be finally determined at this stage.

2) Whether the Claimant is entitled to injunctive relief restraining alienation or dealings with the suit property

20. The Claimant seeks orders restraining alienation, sale, mortgage or other dealings with the suit property pending determination of contribution.
21. The principles governing the grant of injunctive relief are well settled in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, which requires an applicant to establish a prima facie case, irreparable harm, and, where necessary, that the balance of convenience tilts in her favour.
22. A prima facie case was further defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as one which, on the material presented, discloses a right that has apparently been infringed.
23. In *Nguruman Limited v Jan Bonde Nielsen & Others* [2014] eKLR, the Court of Appeal underscored that each of the *Giella* principles is distinct and sequential, and that speculative apprehension of harm is insufficient.



24. In the present case, the Claimant's asserted proprietary right is dependent on proof of contribution, which remains unresolved. The apprehension of alienation is denied and is not supported by evidence of imminence.
25. Granting the injunctive relief sought would therefore risk restraining the registered proprietor on the basis of contested and unproven rights, and would in effect amount to granting substantive relief at a preliminary stage.
26. In the circumstances, the Court finds that the Claimant has not established a basis for the grant of injunctive relief restraining any dealings with the suit property.

3) Whether the Claimant is entitled to injunctive relief restraining eviction or denial of access

28. The Claimant alleges forcible eviction on 25th September 2025, while the 1st Respondent asserts that the Applicant left the matrimonial home voluntarily.
29. Determination of this issue would require findings on the circumstances surrounding the Claimant's departure, and the existence or otherwise of possessory rights in the suit property. Such findings are inherently factual and cannot be satisfactorily made on affidavit evidence alone.
30. The Court therefore finds that the Claimant's entitlement to the injunctive relief sought under this head must await a full hearing.

4) Whether the issues can be conclusively determined on affidavit evidence alone

32. The 1st Respondent challenges the propriety of the Originating Summons procedure.
33. In *Kibutiri v Kibutiri* [1983] KLR, the Court held that the Originating Summons procedure is unsuitable where the determination of rights depends on disputed facts requiring viva voce evidence and cross-examination.
34. The present dispute is characterised by sharply contested factual issues touching on contribution, ownership, and the circumstances under which the Claimant left the matrimonial home.
35. The Court is therefore satisfied that a fair, just and conclusive determination of the rights asserted by the parties cannot be achieved on affidavit evidence alone.

Disposition

36. Having carefully considered the pleadings, affidavits and submissions, the Court declines to grant the orders sought in the Originating Summons dated 09th October 2025 for the reason that they turn on contested issues of fact requiring resolution at a full hearing through viva voce evidence.
37. Given the nature of the dispute and the interests involved, the Court further directs that the matter be heard and determined expeditiously.
38. Costs of the application shall abide the outcome of the trial.
39. Mention before the DR on 14th April 2026 to confirm filing and exchange of witness statements.

DELIVERED AT NYAMIRA THIS 12TH DAY OF FEBRUARY, 2026

WAMAE.T. W. CHERERE

JUDGE

Appearances



Court Assistant - Hilda

For Claimant - Mr. Dulo for E.Dulo & Associates Advocates

For 1st Respondent - Ms. Omwoyo for P.K.Omwoyo & Co. Advocates

For 2nd Respondent - N/A

